

1987

# The State of Utah v. Kent Charles Peterson : Brief of Appellant

Utah Court of Appeals

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Kent Charles Peterson; pro se.

David Wilkinson; Attorney General; Attorneys for Respondent.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

870293  
THE STATE OF UTAH :  
IT NO. \_\_\_\_\_ :  
Plaintiff/Respondent :  
vs. :  
KENT CHARLES PETERSON, : CIVIL CASE NO. \_\_\_\_\_  
Defendant/Appellant :

---

BRIEF OF APPELLANT

Appeal from Order Denying Petitioner/Appellant's Petition for  
a Writ of Habeas Corpus entered in the Third Judicial District Court in  
and for the County of Salt Lake, State of Utah, in Civil Case No. C-87-2711,  
The Honorable John A. Rokich, Presiding Judge.

KENT CHARLES PETERSON  
Petitioner/Appellant  
In Propria Persona  
Post Office Box 250  
Draper, Utah 84020

DAVID L. WILKINSON  
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State of Utah  
236 State Capital Building  
Salt Lake City, Utah 84114  
Attorney for Respondent

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KENT CHARLES PETERSON,  
 Petitioner/Appellant, In Propria Persona;  
 VS.  
 GARY DELAND, DIRECTOR, UTAH STATE  
 DEPARTMENT OF CORRECTIONS, et al.,  
 Respondent's/Appellee's

)  
 )  
 )  
 )  
 )  
 )  
 )  
 )  
 )  
 )

COURT OF APPEALS  
 Civil Case No. \_\_\_\_\_

Comes now Petitioner/Appellant, In Propria Persona; and respectfully submits that this is an Appeal from an Order Denying Petitioner/Appellant's Petition for a Writ of Habeas Corpus entered in the Third Judicial District Court in and for the County of Salt Lake, State of Utah, in Civil No. C-87-2711, said Order Denying Writ of Habeas Corpus was Ordered by the Honorable John A. Rokich, presiding Judge on May 21, 1987.

In the case at bar, Petitioner/Appellant filed a Petition for a Writ of Habeas Corpus, In Propria Persona, having elicited the aid and assistance of a fellow inmate. Petitioner/Appellant filed his Petition for q Writ of Habeas Corpus along with a Memorandum of Points and Authorities in support of his Habeas Corpus Petition through service of the United States Mail.

Petitioner/Appellant's Petition for a Writ of Habeas Corpus was filed in the Third Judicial District Court and an Order was issued by the Honorable John A. Rokich directing that the matter be brought before the Court for trial of the issues in Civil Case No. C-87-2711.

Petitioner/Appellant raised meritorious claims and issues in his Petition for a Writ of Habeas Corpus and he verily believes that even though he is a layman unversed in the law, the facts and the record support his claims. Petitioner/Appellant verily believes that he was not afforded a Fair Evidentiary Hearing allowing him to properly prove his allegations. Even though Petitioner/Appellant's two main allegations centered around the ineffective aid and assistance of counsel and the validity of his plea, and notwithstanding Petitioner/Appellant's belief that he met his burden of proof in compliance with the two-part standard set forth in Strickland v. Washington, 466 U.S. 668, 104, S.Ct. 2052, 80 L.Ed. 2d 674 (1984) and Ake v. Oklahoma, \_\_\_\_\_ U.S. \_\_\_\_\_, 105, S.Ct. 1087, 84 L.Ed.2d 53 (1985). Petitioner/Appellant verily believes that, had he been afforded an opportunity to elicit testimony from his trial counsel, all of his claims would have been established.

Petitioner/Appellant verily believes that the decision of the Honorable John A. Rokich, directing the denial of his Petition for a Writ of Habeas Corpus was biased and not based upon the facts but rather on the nature of Petitioner/Appellant's crime and the possible politics involved.

In the case at bar, Petitioner/Appellant verily believes that the denial of a Writ of Habeas Corpus amounts to the unconstitutional suspension of the Writ of Habeas Corpus, as well as the denial of Access to the Courts guaranteed under a long line of precedents and authorities beginning with Ex Parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941). reh. denied 312 U.S. 716, 61 S.Ct. 823, 85 L.Ed. 1146.

ISSUES RAISED ON APPEAL

I. PETITIONER/APPELLANT ALLEGES THAT A REVERSAL SHOULD BE GRANTED DIRECTING THAT THE LOWER COURT'S DENIAL OF HIS PETITION FOR A WRIT OF HABEAS CORPUS BE VACATED AND SET ASIDE AND THAT A WRIT OF HABEAS CORPUS SHOULD BE GRANTED AS ORIGINALLY PRAYED FOR IN THE PETITION FOR A WRIT OF HABEAS CORPUS, FOR THE REASON THAT PETITIONER/APPELLANT WAS EFFECTIVELY DENIED THE ESSENCE OF PROCEDURAL DUE PROCESS AS SECURED AND GUARANTEED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN VIEW OF THE FACT THAT THE ESSENCE OF PROCEDURAL DUE PROCESS IS A FAIR HEARING. PETITIONER/APPELLANT VERILY BELIEVES THAT HE WAS EFFECTIVELY DENIED ACCESS TO THE COURTS, THAT THE COURT'S DENIAL OF A WRIT OF HABEAS CORPUS AMOUNTS TO THE UNCONSTITUTIONAL SUSPENSION OF THE WRIT OF HABEAS CORPUS IN VIOLATION OF ARTICLE 1, SECTION 5 OF THE CONSTITUTION OF THE STATE OF UTAH, AND THAT THE COURT'S DENIAL OF A WRIT OF HABEAS CORPUS WAS NOT BASED UPON THE FACTS BUT RATHER WAS A BIASED DECISION IN LIEU OF POLITICS AND THE HEINOUS NATURE OF THE OFFENSE PETITIONER/APPELLANT WAS CONVICTED FOR. EFFECTIVELY CAUSES THE DEPRIVATION OF RIGHTS SECURED AND GUARANTEED TO PETITIONER/APPELLANT THROUGH



THE FORCE AND EFFECT OF THE FOURTEENTH AMENDMENT  
TO THE UNITED STATES CONSTITUTION.

2. PETITIONER/APPELLANT RESPECTFULLY ALLEGES AND  
SUBMITS THAT THIS COURT SHOULD REVERS THE LOWER  
COURT'S DECISION DENYING HIS PETITION FOR A  
WRIT OF HABEAS CORPUS FOR THE REASON THAT EVEN  
THOUGH A FAIR EVIDENTIARY HEARING WAS NOT AFFORDED.  
FACTS ELICITED THROUGH TESTIMONY OF WITNESSES  
CLEARLY ESTABLISHED AND PROVED THAT PETITIONER/  
APPELLANT WAS CONVICTED AND INCARCERATED AS THE RESULT  
OF HIS BEING DEPRIVED OF THE EFFECTIVE AID  
AND ASSISTANCE OF COMPETENT LEGAL COUNSEL DURING  
EACH OF THE CRITICAL STAGES OF THE PROCEEDINGS  
AGAINST HIM. SUCH TESTIMONY CLEARLY MET  
PETITIONER/APPELLANT'S BURDEN OF PROVING THE TWO  
PART STANDARD REQUIRED UNDER THE MANDATE SET  
FORTH IN STRICKLAND V. WASHINGTON, 466 U.S. 668  
(1984) EVEN THOUGH THE LOWER COURT FAILED TO  
CALL PETITIONER/APPELLANT'S COUNSEL TO GIVE  
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AND CROSS EXAMINE HIM OR TO ALLOW SAID COUNSEL  
TO REFUTE THE ALLEGATIONS AGAINST HIM. PETITIONER/  
APPELLANT SUBMITS THAT IN ORDER TO ASSURE THAT HE  
HAS BEEN AFFORDED DUE PROCESS AND EQUAL PROTECTION  
OF THE LAW AS GUARANTEED TO HIM UNDER THE FOURTEENTH  
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HAVE BEEN AFFORDED AN OPPORTUNITY TO QUESTION  
AND CROSS EXAMINE COUNSEL IN ORDER TO CLEARLY

PROVE HIS CLAIM OF INEFFECTIVE AID AND ASSISTANCE OF COMPETENT COUNSEL DURING EACH OF THE CRITICAL STAGES OF THE PROCEEDINGS AGAINST HIM. SAID TESTIMONY OF COUNSEL WOULD HAVE FURTHER PROVEN EACH OF PETITIONER/APPELLANT'S OTHER CLAIMS.

3. BECAUSE OF THE INEFFECTIVE AID AND ASSISTANCE OF COUNSEL, PETITIONER/APPELLANT'S PLEA OF GUILTY WAS NOT ENTERED FREELY, VOLUNTARILY AND UNDERSTANDINGLY BY ONE FULLY AWARE OF THE CONSEQUENCES THEREOF BUT INSTEAD, SAID PLEA WAS ENTERED AS THE RESULT OF THREATS, PROMISES AND INDUCEMENTS. THEREFORE SAID PLEA OF GUILTY MUST BE VACATED AND SET ASIDE AS CONSTITUTIONALLY NULL AND VOID BECAUSE OF THE DEPRIVATION OF PETITIONER/APPELLANT'S RIGHTS AS SECURED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
4. THE PETITIONER/APPELLANT IN THIS CASE AT BAR COULD NOT HAVE NOR SHOULD HAVE BEEN CHARGED WITH THE CRIME OF FORCIBLE SEXUAL ABUSE, A FELONY OF THE SECOND DEGREE. IN THE PETITIONER/APPELLANT SHOULD HAVE BEEN CHARGED IN ANY CRIMINAL COMPLAINT, IT SHOULD HAVE BEEN UNDER THE UTAH CODE UNDER SECTION 76-9-702, LEWDNESS INVOLVING A CHILD: /2/ LEWDNESS INVOLVING A CHILD OVER THE AGE OF 14 YEARS IS A CLASS B MISDEMEANOR. A LETTER BY THE PETITIONER/APPELLANT'S VICTIM PEGGY OLSEN, DATED ON DECEMBER 1, 1986, CLEARLY

STATED THE FOLLOWING RECORD WITH RESPECT TO THE  
CRIMINAL INVOLVEMENT BETWEEN HERSELF AND THE  
PETITIONER:

"AT ALL TIMES I HAD MY CLOTHING ON. HE TOUCHED ME  
WITHOUT MY PERMISSION IN PLACES I SHOULD NOT HAVE  
BEEN TOUCHED. IT WAS DONE SUBTLY AND WITHOUT  
CONVERSATION FROM EITHER OF US. IT WAS AN UN-  
COMFORTABLE EXPERIENCE HOWEVER, AT NO TIME DID  
HE ENCOURAGE OR COMPEL ME BY WORD OR ACTION TO HAVE  
A FORCIBLE SEXUAL RELATIONSHIP WITH HIM."

THE ABOVE ADMISSIONS OF THE VICTIM, PEGGY OLSEN  
CLEARLY SHOWS THAT THE PETITIONER/APPELLANT COULD  
NOT HAVE OR SHOULD HAVE BEEN CHARGED WITH THE  
CRIME OF FORCIBLE SEXUAL ABUSE, A FELONY OF THE  
SECOND DEGREE, AND IF THE PETITIONER IN THIS CASE  
AT BAR SHOULD HAVE BEEN CHARGED WITH ANY CRIMINAL  
MISCONDUCT, IT SHOULD HAVE BEEN A CLASS B  
MISDEMEANOR.

## SUMMARY OF ARGUMENT

In summarizing his argument on appeal, Petitioner/Appellant submits that he has shown denial of access to the Courts pursuant to the mandates set forth in the long line of authorities following Ex Parte Hull, 312 U.S. 546, 61 S. Ct. 640, 85 L.Ed. 1034 (1941). Based on the fact that the decisions of the lower court was not based upon the facts adduced at the lower court evidentiary hearing and the fact that he was deprived of a full and fair evidentiary hearing Petitioner/Appellant further verily believes he has shown the unconstitutional suspension of the Writ of Habeas Corpus in violation of Article 1, section 5, of the Utah Constitution and the mandate set forth in Jones v. Smith, 505 P. 2d 194.

Petitioner/Appellant submits that he has established that he has been deprived of his Sixth and Fourteenth Amendment Rights to the effective aid and assistance of competent legal counsel under the authorities of Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and Ake v. Oklahoma, \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985).

And finally, Petitioner/Appellant has established that his Plea of Guilty must be declared constitutionally null and void pursuant to the long line of authorities beginning with Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed 2d 274 (1969) through Ake v. Oklahoma, \_\_\_\_\_ U.S. \_\_\_\_\_, 105, S.Ct. 1087, 84 L. Ed. 2d 53 (1985).

Petitioner/Appellant verily believes that he has established his cause and that he has raised meritorious issues and is entitled to pleany consideration.

## ARGUMENT POINT ONE

Petitioner/Appellant respectfully submits that the right of prisoners be afforded access to the courts embraces and includes the right to a fair hearing. The essence of due process is the right to a fair hearing. The United States Supreme Court mandated that prisoners are entitled to access to the courts in a long line of authorities beginning with Ex Parte Hull, 312 U.S. 546, 61 S. Ct. 640, 85 L. Ed. 1034, (1941) . Smith v. Bennett, 365 U.S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39 (1961). Johnson v. Avery, 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d. 718 (1969). Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595, L. Ed. 2d 652 (1972). The right of prisoners to have an "adequate" opportunity to present their claims fairly is set out in Ross v. Moffitt, 417 U.S., at 616, 94 S. Ct., at 2446. The Court here is further referred to the authorities of Younger v. Gilmore, 404 U.S. 15, 92 S. Ct. 250, 30 L. Ed. 2d 142 (1971), and Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977).

Article I, Section 5 of the Utah Constitution guarantees that the Writ of Habeas Corpus shall not be suspended unless in the "case of rebellion or invasion of the public safety requires it."

And the Utah Supreme Court has declared that:

"There is no reason why Habeas Corpus cannot be brought anytime a person is wrongfully restrained of his freedom. whether before trial or after trial." Jones v. Smith, 550 P. 2d. 194.

## ARGUMENT POINT TWO

Petitioner/Appellant submits that the decision of the lower court was not based upon the evidence and facts as presented and he was not afforded an adequate opportunity to present his claims fairly as required under the authority of Ross v. Moffitt, 417 U.S., at 616, 94 S. Ct., at 2246.

Petitioner/Appellant submits that he has met his burden of proof in establishing his Sixth and Fourteenth Amendment rights were denied under the two part standard set forth in Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)., Ake v. Oklahoma, \_\_\_\_\_ U.S.\_\_\_\_\_, 105 S.Ct. 1087, 84 L.Ed 2d 53 (1985). In assessing whether someone is functioning as the "counsel" guaranteed by the Sixth amendment, Justice O'Connor indicated that the proper standard is that of 'reasonable effective assistance'; this was not the case in the case at bar. Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist his client, the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.

## ARGUMENT POINT THREE

Petitioner/Appellant's conviction should have been vacated and set aside under the authority of Boykin v. Alabama, 395 U.S. 328, 89 S. Ct. 1709 23 L. Ed. 2d 274 (1969)., based upon the fact that the evidence adduced at the lower Court Evidentiary Hearing clearly shows Petitioner/Appellant's constitutional rights were violated under the two part standard set forth in Strickland v. Washington, 466 U.S. 668, 104, S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and Ake v. Oklahoma, \_\_\_\_\_ U.S.\_\_\_\_\_,

105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). In the case at bar, Petitioner/Appellant's Plea of Guilty was entered and accepted without Petitioner/Appellant being made aware of the requisite element of the offense to which his plea was entered. See: Henderson v. Morgan, 426 U.S. 637 (1976).

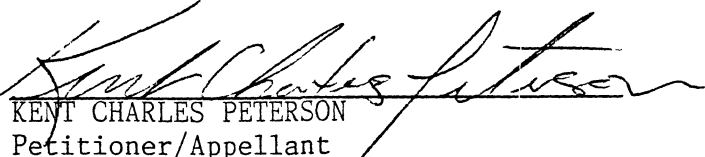
CONCLUSION

WHEREFORE: Based upon the facts of record and the evidence adduced at the lower court hearing, Petitioner/Appellant respectfully submits that he verily believes that he has a meritorious cause of action and that this Court should reverse the decision of the lower court. Directing that he be granted a Writ of Habeas Corpus as prayed for. Or, in the alternative, that the matter be returned to the lower Court for a full and fair evidentiary hearing with a decision to be rendered upon the facts and evidence as presented.

Petitioner/Appellant respectfully prays that this Court afford his cause of action plenary consideration.

DATED this 13 day of July, 1987.

Respectfully Submitted,



KENT CHARLES PETERSON  
Petitioner/Appellant  
In Propria Persona  
Post Office Box 250  
Draper, Utah 84020

CERTIFICATE OF SERVICE

I, Kent Charles Peterson, hereby certify that four copies of the foregoing Brief of Appellant will be delivered to the Attorney General's Office at 236 State Capital Building, Salt Lake City, Utah 84114, this 13 day of July, 1987.

  
KENT CHARLES PETERSON, APPELLANT

Delivered by Ravce Lee this 13 day  
of July, 1987.



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---

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

KENT CHARLES PETERSON,	:	
Petitioner,	:	ORDER OF DISMISSAL
-v-	:	
	:	Case No. 87-2711
GARY DELAND, et al.,	:	(Judge Rokich)
Respondents.	:	

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The above-entitled matter came before the Court on the 21st day of May, 1987, before the Honorable John A. Rokich. Petitioner was present and was represented by his attorney, Philip G. Jones. Respondent was represented by Kimberly K. Hornak, Assistant Attorney General.

The Court, having considered petitioner's petition for a Writ of Habeas Corpus and having heard argument from the parties finds that the claims raised by petitioner are without merit. The court concludes that the Petitioner voluntarily, knowingly and intelligently entered his guilty plea and that all of the petitioner's constitutional rights were protected. The court also concludes that decisions by the Board of Pardons are final and not subject to review by this Court.

IT IS ORDERED AND ADJUDGED that petitioner's petition  
for Writ of Habeas Corpus be denied.

DATED this \_\_\_\_ day of June, 1987.

BY THE COURT:

-----  
HONORABLE JOHN A. ROKICH  
Third District Court Judge

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the  
foregoing Findings of Fact and Order of Dismissal were mailed,  
postage prepaid, to Phil Jones, Attorney for Petitioner, 930  
South State Street, Suite #10, Orem, Utah 84057, and Kent Charles  
Peterson, petitioner, P.O. Box 250, Draper, Utah 84020, this  
10 day of June, 1987.

Brenda Stubbins